The Central Law Journal.

ST. LOUIS, MARCH 9, 1883

CURRENT TOPICS.

The well-recognized difficulties of dealing with the defense of insanity in criminal cases, has led to the enactment in Wisconsin of a statute which provides not only that a defense shall be specially and separately pleaded with the plea of not guilty, but further, that the separate issue as to the defendant's sanity at the time of the alleged offense thus made, shall be first tried and determined by the jury empaneled in the case, before the issue upon the plea of not guilty is tried by them. Wis. Rev. Stat., 4697, 4698 and 4699. The practical utility of such a provision, tending to the simplification of issues, is manifest, and it seems strange that it has not been more generally adopted. In the recent case of Bennett v. State, it was urged by the defense that such an act was unconstitutional and void as being contrary to section 7, article 1 of the Constitution of the State, providing that one accused of crime shall "have the right to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law," on the ground that by such a jury trial is intended a jury trial as at common law. This position the court held to be untenable, and that the substance of the right of trial by jury is unimpaired. Says the opinion of the court: "The only other objection made to the act is, that it requires the jury to dispose of this plea by a verdict thereon before the trial shall proceed upon the plea of not guilty. This, we think, is a matter which relates merely to the form of a jury trial, and not to the substance; and it is also commendable as being the most practical and convenient method of disposing of the whole case. If the jury find the insanity, there will be no need of going through the trial upon the plea of not guilty; such finding disposes of the whole case. Suppose a former conviction or former acquittal was pleaded, together with the plea of not guilty, certainly an orderly disposition of these issues would be to try the issue on such first-named plea before the issue upon the plea of not guilty; and in such case it is clear that if the issue on such plea was against the accused, it would be conclusive upon the trial of the issue of not guilty. It may be said that the issue on the plea of insanity is not like the plea of a former conviction or acquittal, because the question of insanity is and always was a fact which might be given in evidence under the plea of not guilty, and that the defendant can not be required, against his consent, to make a special issue upon that fact, and proceed to try it separately and be concluded by the verdict thereon, when he is tried on the plea of not guilty; that if he can be compelled to be tried upon such issue separately, he may be compelled to plead separately, in all indictments or informations for murder or homicide, that the killing was in self-defense, or that it happened by misadventure or accident, and thus require the accused, in every case of homicide where he did not deny the killing, to plead specially his defense. Even if the support of this statute goes to that extent, we do not see how this takes away the defendant's right to a jury trial. Such a statute would simply regulate the pleadings and mode of procedure, and not go to the substance of a trial by jury. All the issues would still be tried by a jury, in the same way they are now tried."

We have heretofore mentioned the attempt which was being made in New York and other Eastern States to find a practical remedy for the holders of repudiated State bonds, by means of a statute authorizing the assignment of such bonds to the State. See 14 Cent. L. J. 361. New York passed such a statute, became the assignee of bonds of the State of Louisiana held by some of its own citizens, and brought the action in question. The Federal Supreme Court has dismissed the bill, holding that the suit is in effect not the suit of the State of New York, but the suit of an individual citizen of the State of New York against another State; that the State of New York is merely endeavoring to act as collecting agent for its citizens, and that this can not be allowed; that the judicial power of the United States can not extend to suits commenced and prosecuted as this in effect is by an individual against one of the States of the Union.

THE ACT OF GOD.

This phrase has been used for many centuries to describe events occurring through the inexorable necessity which will excuse the performance of certain contracts and legal duties, particularly those of common carriers. Sir William Jones considered the expression irreverent, and said that "it would be more proper as well as more decent, to substitute in its place, inevitable accident."[1] The amendment, however, has not been generally accepted, as the new phrase is not considered by the profession to express as fully as the old the meaning of the law. Forward v. Pittard[2] is the leading case on the subject. It was an action to recover from a carrier the value of certain hops destroyed by fire while in his charge, the fire occurring neither by lightning nor by the negligence of the defendant. Lord Mansfield said: "There is a nicety of distinction between the act of God and inevitable necessity. * * * * The question is here, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by common law: a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God or the King's enemies.

Now, what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by His permission; everything by His knowledge. But to prevent litigation, collusion and the going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests.

If an armed force comes to rob the carrier, he is liable, and a reason is given in the books which is a bad one, *viz.*, that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots of 1780. The true reason is for fear it may give room for collusion, that the master may contrive to be robbed on purpose and share the spoil. * * * * The carrier, therefore, in this case, is liable, inasmuch as he is liable for inevitable accident."

This case has been followed and approved by many authorities on both sides of the Atlantic,[3] and may be said to express in general terms the whole doctrine of the law on the subject. The only notable dissentient is the learned judge who delivered the opinion of the court in the case of Hays v. Kennedy.[4] In an elaborate opinion, he holds that previous to the ruling of Lord Mansfield in Forward v. Pittard,[5] the term "act of God" had not been applied, much less exclusively appropriated, to the peculiar casualities which operate to the relief of common carriers. Coke, he says, uses the phrase to indicate merely death; and Holt, C. J., and others, equally ignore the peculiar technical meaning applied to the words in Forward v. Pittard. He denies that in any proper sense a common carrier is by the common law of England an insurer, and states his liability to be simply for negligence. He asserts that the common carrier is responsible for any losses which, by due diligence, he might have prevented; and is not liable for those, from whatsoever cause proceeding, which, by the utmost exertion of the skill and energy of a very prudent man, he was powerless to arrest. It would be superfluous to say that these views have not been approved by the profession, and the *dicta* of Lord Mansfield have been almost universally followed. There are corollaries and applications to the rules he lays down, but apparently no exceptions.

To relieve a carrier from responsibility on the ground that the disaster was caused by the act of God, it must be shown that such act was the immediate and proximate, not the remote cause.[6] Indeed, in some cases, it

[1] Essay on the Law of Bailments (Orig. ed.), p. 103.
[2] 1 Term R. 27.

[3] Gordon v. Little, 8 Serg. & R. 533; Pendal v. Rench, 4 McLean, 259; Powell v. Mills, 30 Miss. 231; Klauber v. Express Co., 21 Wis. 21; Hooper v. Wells, 27 Cal. 11; Harrell v. Owens, 1 Dev. & Batt. 273; Elliott v. Rossell, 10 Johns. 1; Oakley v. Steam Packet Co., 11 Exch. 617.
[4] 41 Pa. St. 378.
[5] *Supra.*
[6] Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; New Brunswick, etc. Co. v. Tiers, 24 N. J. L. 697; Michaels v. New York Central R. Co., 30 N. Y. 564; Railroad

has been held that to relieve the carrier, the act of God must be not only the immediate, but the sole cause, for, it is said by the court, the carrier can not be relieved if the loss occurs from mixed causes.[7] If the loss is in any degree the result of human interference, the carrier can not escape liability. In Dunson v. New York Central R. Co.,[8] it was held that if the property is injured or lost by the act of God, while the carrier is in default, he is liable for the loss or injury. In Reed v. Spalding,[9] it is said to be a condition precedent to the exoneration of the common carrier, that he shall be in no default, and that no act of his operated in concurrence with the act of God in producing the catastrophe.

On the other hand, it has been held by the Supreme Court of the United States,[10] that where the proximate cause of the disaster was the act of God, the carrier is exonerated, although he may have been guilty of negligence which was a remote cause. In Denny v. New York Central R. Co.,[11] it was held that carriers who negligently delay the transportation of goods are not responsible for the consequences of an act of God; although if the goods had been promptly transported they would have escaped the injury. A wrongdoer, the court says, is responsible only for the proximate, and not for the remote consequences of his acts, and there is nothing in the policy of the law relative to common carriers that requires a more stringent rule as to consequential damages to be applied to them than to other persons.

This principle, it is believed, controls the question, and notwithstanding the very respectable authority to the contrary, the true rule may be stated thus: That antecedent negligence, misfeasance or malfeasance operating as a remote cause of the loss, will not preclude the carrier from claiming exemption from liability for such loss if it occurs proximately from the act of God, but any immediate concurrent or contributory default or negligence will.

The application of these principles, however, requires no little discrimination. It is often a serious question whether there was any act of God at all, and whether, if there was, it was the immediate or the remote cause of the loss; whether there was on the part of the carrier any negligence or misfeasance, and, if so, whether the injury was a remote consequence of such default, or whether such negligence was concurrent and contributory. Lord Mansfield's definition of an act of God has been generally accepted, although some authorities express it with variations, in substance as well as language. In McArthur v. Sears,[12] the act of God is defined to be an inevitable accident *without the intervention of man*. In Ferguson v. Brent,[13] the court illustrates the distinction between the act of God and inevitable accident, by saying that a stroke of lightning is undoubtedly an act of God, but a collision between two vessels may be an inevitable accident, and is certainly no act of God. In Oakley v. S. P. Co.,[14] it is said that the act of God means something overwhelming, not an accidental circumstance. Upon the whole, the definition of Lord Mansfield in Forward v. Pittard,[15] gives as accurate a description of an act of God as can well be given in general terms. The general operation of the forces of nature, storms, tempests, winds and waves, perils of the seas, extremes of cold and heat, may all be included in the general term. In Colt v. McMechan,[16] Kent, C. J., held that a sudden failure of wind by which a disaster occurred was an act of God. A wind "unheard of, or such as rarely occurs," or an extraordinary flood in a stream[17] are acts of God, and in proper cases will excuse the carrier. Such, also, is an unknown snag in a river,[18] and, under circumstances, the freezing of a

Co. v. Reeves, 10 Wall. (77 U. S.) 176; Merritt v. Earle, 31 Barb. 38; s. c., 29 N. Y. 115.

7 Merritt v. Earle, 31 Barb. 38; s. c., 29 N. Y. 115.

8 3 Lans. (N. Y.) 265. But see Denny v. New York Central R. Co., 18 Gray, 481.

9 30 N. Y. 630. See, also, Wibert v. New York, etc. R. Co., 2 Kernan, 245; Harmony v. Bingham, Id. 99; Basin v. Charleston, etc. Co., 1 Harp. (S. C.) 262; Bell v. Read, 4 Binn. 127; Hart v. Allen, 2 Watts. 114; Crosby v. Fitch, 12 Conn. 410; Gordon v. Little, 8 Serg. & R. 533; King v. Shepherd, 3 Story, 349.

10 Railroad Company v. Reeves, 10 Wall. (77 U. S.) 176. See, also, Morrison v. Davis, 20 Pa. St. 171.

11 13 Gray, 481.

12 21 Wend., 190.

13 12 Md., 9.

14 11 Exch., 617.

15 *Supra*.

16 6 Johns., 158; see also Kemp v. Caughtry, 11 Johns. 107.

17 Campbell v. Morse Harp. (S. C.), 468; Wallace v Clayton, 42 Ga. 443; Nashville, etc. Co. v. David, 6 Heisk. (Tenn.) 261.

18 Smyel v. Nolan, 2 Bailey, 421; Faulkner v. Wright, 1 Rice, (S. C.) 103.

canal [19] may be accounted an act of God, and excuse the carrier. Goods thrown overboard in a tempest to save the ship [20] and mariners, are held to have been lost by the act of God.

The distinction between immediate and remote causes of disaster, as connected with this subject, is not always very apparent. In the case of the New Brunswick, etc. Co. v. Tiers,[21] an attempt was made to escape liability on account of an injury to a ship because an unusually low tide, conceded to be an act of God, was the cause of the disaster, but the court held that the projecting piece of timber in the wharf was the immediate, and the low tide that permitted the vessel to come into contact with it was the remote cause, and, being remote, could not excuse the carrier. In Michaels v. New York Central R. Co.,[22] goods were detained for want of a bill of back charges, and were damaged by an unusually high tide. In this case it was held that the detention was the immediate, and the high water the remote, cause of the injury, and that therefore the carrier was responsible.

Common carriers are, in most respects, held to a strict responsibility, and, in seeking to avail themselves of the exemptions arising from acts of God, they are not specially favored. Indeed, it may be said that, in such cases, the courts are more than usually rigid. All presumptions are taken against them, and the burden is thrown upon them not only to show that the loss was the consequence of the act of God, but to negative all presumptions of the remoteness of the cause, the possibility of prevention, and the existence of negligence.[23] In Colt v. McMechan,[24] Chancellor Kent remarks that the *casus fortuitus* of the civil law is *quod fato contingit cuivis diligentissimo possit contingere*, and adds that a common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. It may, however, be suggested that these extreme and superlative expressions should receive a reasonable, not a literal construction. The latter would, in effect, abrogate the defense altogether. A shipwreck, it might be said, could have been prevented by keeping the vessel in port and the mariners on shore, and the carrier by land could have avoided any possible liability by staying at home and carrying nothing. The *diligentia diligentissimi* required of a carrier is that of a prudent, capable man, engaged in the same or the like occupation. In Nashville, etc. Co. v. David,[25] the court holds that the carrier is bound to the diligence of a very prudent man, and adds that, in emergencies, the law requires of carriers "ordinary care, skill and foresight, which is the common prudence that men of business and heads of families usually exhibit in matters that are interesting to them.[26] It should be borne in mind that the liability of common carriers though rigid, is reasonable, and it follows that the degree of diligence required of them, even when they claim exemption on account of the act of God, is not so superlative as to be impossible. For example, it has been held that the striking of a vessel on a rock not generally known, nor actually known to the master, will be construed as an act of God, and excuse the carrier from responsibility.[27] Manifestly it would be no reasonable answer to the defense in such case that if any one master or pilot in the world knew the rock and its position, the master of the unlucky ship in question should also have known it. It is, of course, essential in all cases that the carrier shall be competent, shall understand his business, shall use due diligence to avoid disaster, and if the matter concerns navigation shall know the dangerous spots on the route or voyage.[28]

There have been repeated attempts to include among the acts of God that will excuse the carrier accidental fire, but the uniform result has been failure. To say nothing of the leading case of Forward v. Pittard,[29] it has been held in many subsequent cases that an occurrence of that character [30] is not such an

[19] Bowman v. Teal, 23 Wend. 306; Wing v. New York, etc. R. Co., 1 Hilton, 235.
[20] Gillott v. Ellis, 11 Ill. 579.
[21] 24 N. J. L., 697. See also Sprowl & Kellar, 4 Stew. & P. (Ala.) 382.
[22] 30 N. Y., 564.
[23] Murphy v. Staton, 3 Munf. (Va.) 239; Turney v. Wilson, 7 Yerg. (Tenn.) 340.
[24] *Supra.*
[25] 6 Heisk. (Tenn.), 261.
[26] R. Co. v. Reeves, 10 Wall. (77 U. S.) 166; Morrison v. Davis, 20 Pa. St. 171.
[27] Williams v. Grant, 1 Conn. 487.
[28] Craig v. Childress, Peck (Tenn.), 270.
[29] *Supra.*
[30] Gilmore v. Carman, 1 Smed. & M. (Miss.) 279; Patton v. McGrath, Dudley (S. C.), 159; U. M., etc. Co. v. I. & C. R. Co., 1 Disney, 480; Parker v. Flagg, 26 Me. 181.

operation of the elements as will, like winds or earthquakes, exclude the idea of human agency, and consequent human responsibility. The only case in which destruction by fire has been recognized as an act of God is that of ignition by lightning. It may, however, be presumed that a fire caused by volcanic action would be included in the same category if a case of that character should be presented.

WM. L. MURFREE, SR.

St. Louis, Mo.

SOLICITORS ACTING PROFESSIONALLY AGAINST FORMER CLIENTS.

The Good Advocate, saith old Fuller,[1] "is faithful to that side that first retains him. Not like Demosthenes, who secretly wrote one oration for Phormio, and another in the same matter for Apolleodorus, his adversary." Nor, let us add, like him of whom "rare Ben Johnson" wrote,

"No cause, nor client fat, will Cheveril leese;
But as they come, on both sides he takes fees,
And pleaseth both; for while he melts his grease
For this, that wins for whom he holds his peace."

The practice as regards retainers has not infrequently led advocates into a position hardly less dubious,[2] and often have clients learned to their loss that counsel, like Hudibras, "could still change sides, and still confute." But, it has been held that it is not the province of the courts to interfere in such matters.[3] "I am of opinion," said Sir Launcelot Shadwell, V. C., "that a counsel, unless he is retained by the plaintiff, has a perfect right to draw and sign the answers, though he may also have signed the bill. I remember a case of the same kind occurred to me when I was at the bar. I drew the bill, and not being retained by the plaintiff, I drew the answers. I then advised upon the evidence for the plaintiff, and then on that for the defendant. There was afterwards a motion in the cause, and I appeared on the motion, but on what side I do not recollect. I am clearly of opinion that unless a counsel is retained by the plaintiff, it is his duty, if required, to render his services to the other parties in the cause, although he may have drawn the bill."[4] But counsel will be restrained by injunction from divulging the secrets of a former client.[5] While a solicitor will not, any more than counsel, be restrained from acting for a client simply on account of his having acted in the relationship of solicitor for another client with conflicting interests;[6] at the same time, he can not, of course, act for both sides, where the interests are adverse.[7] And not only must he refrain from allying himself with his client's enemy, but he must be very careful how he leagues with the enemy of his client's enemy. So, where a solicitor is acting for a client who has brought an action in which judgment is reserved, and another client, who has a claim on the defendant in the action, applies to him for advice as to enforcing his claim, it is the duty of the solicitor not to act for the second client, if by so doing he will be likely to injure the position of the first client in case he recover judgment in the action.[8]

The duties of a solicitor towards his former client, in reference to acting for his opponent, formed the subject of elaborate consideration in Little v. Kingswood, etc. Colliery Co.[9] The Irish cases touching the subject were all (unless we except Flynn v. Marshall,[10] and Carter v. Palmer,[11]) referred to, and indeed formed the leading topic of contention. All the previous English cases, also, were discussed, save five which we have found.[12] Moreover, we find a case decided in April last by the Supreme Court of Queensland, in which the same questions were carefully examined and determined.[13] And as the subject is of practical importance, and of special professional interest, we shall collate

[1] Holy State, b. 3, c. 1.
[2] See Law Mag., vol. 4, p. 417.
[3] *Ex parte* Elsee, Mont. Ca. Bk. 69; Baylis v. Grout, 2 M. & K. 816; 19 Ves. 276.
[4] Anon., 3 Jur. 603.
[5] Carter v. Palmer, 1 Ir. Eq. Rep. 289; 1 Dr. & W. 722.
[6] Bricheno v. Thorp, Jac. 300.
[7] O'Brien v. Graham, 5 Ir. L. Rep. 406; Walsh v. Nally, 11 Ir. L. T. Rep. 75.
[8] Barber v. Stone, 50 L. J. C. P. 297.
[9] Reported in the *Law Times* of Dec. 2, 1882.
[10] 1 L. Rec. O. S. 59.
[11] *Ubi supra.*
[12] Robinson v. Mullett, 4 Price, 353; Grissell v. Peto, 9 Bing. 1; 2 M. & Sc. 2; Johnston v. Marryat, 2 Cr. & M. 183; 2 Dow. 343; 4 Tyr. 83; Evitt v. Price, 1 Sim. 483; Lewis v. Smith, 1 Mac. & G. 417.
[13] Mills v. Day Dawn Block Gold Mining Co., *In re* Marsland, 1 Q. L. J. 57, 62.

the cases, in chronological order, and endeavor to point out the principles they support.

The leading case is Cholmondeley v. Clinton,[14] decided by Lord Eldon in 1815, after consulting all the judges. That case decided merely that a solicitor can not voluntarily quit his client and act against him; "that having left the cause, he was not in the situation of a solicitor discharged by his client, and therefore could not become the solicitor of the other party in the same cause." "A most honest man, so changing his situation, might communicate a fact appearing to him to have no connection with the case, and yet the whole title of his former client might depend upon it," observed the Chancellor, adding, "it appeared to me, and to all the judges, that nothing could be more dangerous than to permit a solicitor employed by A, in a cause between him and B, to leave A while still willing to retain him, and enter into the service of B." But, the danger is equally great where the solicitor is discharged by his client; and it has been thought that the principle applicable to the case of a solicitor discharging himself would equally apply to the case of a solicitor discharged, properly at least, by his client. In either of such cases, injury might arise to the client, without his being willingly the cause of creating that possibility; and it is to be remembered that the privilege protecting professional communications does not terminate with the death of the client, but belongs afterwards to parties claiming under him, as against parties claiming adversely to him.[15] So far, however, it has been presupposed that it would be necessary for the client's protection that his solicitor should not give the benefit of his resources to an opposing client. On the other hand, we find it next held, in 1817, that a solicitor who has acted to a certain extent only for parties, defendants in an amicable suit in chancery, will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, where the solicitor makes an affidavit that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, and that he has no knowledge of any facts unknown to his clients.[16] Nor, as held in 1821, will an injunction be granted to restrain a solicitor from disclosing matters come to his knowledge respecting the rights of parties by whom he has been employed, by giving evidence in judicial proceedings or otherwise; for that would amount in effect to saying, that the Court of Chancery will not trust other courts with the consideration of whether he ought or ought not to answer.[17] Distinguishing between the cases of a voluntary disclosure of confidential communications and the disclosure of such in evidence, Lord Eldon said that, "if he voluntarily makes a communication of what has come to his knowledge confidentially, it is a great breach of his duty; but there is a difference between ordering him not to communicate to an individual, and ordering him not to communicate to a court of justice by giving evidence; for the court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege, or that, if he does not, the court will make him claim it." Here, too, approving of Cholmondeley v. Clinton, he said: "There the gentleman who had been concerned for Lord Clinton, discharged himself, and went over to the other side. It appeared to me, and to all the judges, that nothing could be more dangerous than to permit a solicitor employed by A, in a cause between him and B, to leave A while still willing to retain him, and enter into the service of B." Observations to a like effect were made in Bricheno v. Thorp,[18] in which, in the same year, an attempt was unsuccessfully made to extend the principle in question, so as to prevent a person who had been a clerk to the plaintiff's solicitor during a suit, but had since been admitted a solicitor, from acting as the defendant's solicitor.

The decisions next in date took place in this country. In Bricheno v. Thorp, last cited, Lord Eldon, referring to Cholmondeley v. Clinton, had said: "If Lord Clinton had discharged the gentleman, and would not continue to employ him, on such a case no opinion was given. But it being by his own act

[14] 19 Ves. 261; Coop. 80.
[15] Fenwick v. Reed, 1 Mer. 114; Russell v. Jackson, 9 Ha. 391.
[16] Robinson v. Mullett, 4 Price, 353.
[17] Beer v. Ward, Jac. 77.
[18] Jac. 300.

that he ceased to be employed, the judges were of opinion that he could not carry over to the other side the information acquired in the service from which he had discharged himself." And it is also to be observed that the application there made was, not only to restrain the solicitor from acting for the defendants or communicating any information relating to the matters in dispute, but to restrain the defendants from employing the solicitor; while in Cholmondey v. Clinton the application and apparently the order made were similar. Now, in Hobhouse v. Hamilton,[19] decided in 1821 but not published till 1837, it appeared that R H had acted as family or assistant solicitor for defendants in a cause, from 1793 down to 1817, when he was discharged by the defendant F H, who immediately after filed a bill to impeach securities given by him to R H for services as a solicitor. This suit was compromised, and in 1819 R H became solicitor for G H, an adverse defendant in the cause, and acted as such against F H for nearly a year and a half, to the knowledge of the law and land agent of F H. Notwithstanding that G H insisted upon the acquiescence of F H for so long a time, and that he would suffer serious injury if an injunction were granted after such delay, and notwithstanding that R H in his affidavit stated that he had not obtained any information the disclosure of which would prejudice F H, and that he had not betrayed and did not intend to betray any confidence or violate any trust reposed in him, G H was restrained by Sir W. M'Mahon, M.R., on the application of F H from employing R H, and R H was restrained from being concerned for, or giving any advice or assistance to G H in that or any other cause against F H, the matter of which came to his knowledge as solicitor for F H, or upon which he was consulted or communicated with in his character of solicitor by F H. The same learned judge, in 1825, expressly held that it makes no difference, where there have been confidential communications, that the solicitor has been discharged by his client.[20] After observing that the "retainer of a solicitor always implies confidence," he said: "The principle of Cholmondeley v. Clinton, as I understand it, is to render it impracticable for a solicitor to accept of a new and inconsistent engagement which will almost inevitably lead to the violation of this duty. The duty of a solicitor must be violated if the case of one party in a cause is conducted by the person acquainted confidentially with all the weaker parts and special circumstances of the title or case of his opponent;" and he added, "If the principle on which relief is given by injunction is sound, it seems difficult and inconvenient to make it depend upon the solution of the question whether the solicitor has retired from the client, or whether the client has changed him without any adequate cause, or has been compelled to dismiss him on account of misconduct or neglect."[21] Indeed, the case of a discharged solicitor would appear to require the application of this jurisdiction more strongly than any other, as the angry feelings of the solicitor might induce him to act in a more hostile manner against the client; nor was any distinction of the kind taken in the English case of Evitt v. Price.[22] In that case, decided in 1827, we again find Cholmondeley v. Clinton, referred to, and a solicitor obtained an injunction to restrain accountants, whom he had employed, from disclosing confidential secrets thereby learned. In Flynn v. Marshall,[23] decided by the Irish Court of Exchequer in November, 1828, it appeared that the solicitor employed by Marshall had recovered a civil bill decree in ejectment against Flynn. He was afterwards employed by Flynn to bring a counter ejectment against Marshall, grounded on a defect in the former in reference to the verifying affidavit necessary to give jurisdiction; but before bringing the ejectment he sent word to Marshall, who appears not to have made objection. The solicitor, notwithstanding, was ordered to pay the costs of the second ejectment; the court observing: "On general principles an attorney ought not to be allowed to be concerned on one side in proceedings in which he was originally in a different interest, and particularly when he is taking advantage of an omission occasioned by his own neglect." In the following month, we again

[19] S. & Sc. 359.
[20] Hutchins v. Hutchins, 1 Hog. 315.
[21] *Cf.* as to purchase by solicitor from client, after termination of relation, cases refered to in Seton, Decrees, 4th ed. 1365, 1669.
[22] 1 Sim. 483.
[23] 1 L. Rec. (O. S.) 59.

find Sir W. M'Mahon, M. R., granting an injunction against a party restraining him from employing a solicitor, and against the solicitor to restrain him from acting.[24] But in Grissell v. Peto,[25] in 1832, an injunction was refused, in England, to restrain the defendant's attorneys from acting in the cause, on the ground that they had obtained a knowledge of the plaintiff's case in course of a chancery suit in which they had been acting in conjunction with the plaintiff, and in which the defendant had no interest; the defendant's attorney deposing that, in that suit, they also acted for the defendant, Tindal, C. J., observing that nothing but a very strong case ought to induce the court to interfere. The next case occurred in 1833, holding that where an attorney has been employed in a cause and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate.[26] And, therefore, where (as in that case) an attorney was employed by the assignees of a bankrupt to commence an action, and he accordingly did so, and went on to issue, and in the course of his employment laid a case before counsel containing all the facts of the case, the court refused to restrain him from acting for the defendant after his dismissal by the plaintiffs, there being no affidavit by the parties or their solicitor showing that the attorney had obtained a knowledge of facts which would be prejudicial to their cause to communicate, nor any affidavit stating that the case which had been laid before counsel disclosed facts which it was necessary to conceal, and which would be injurious to the plaintiffs if they were communicated. An order had been made to change the defendant's attorney, and a rule had been obtained to show cause why it should not be set aside, and the attorney restrained from acting, upon notice being given to him (he not being a party to the rule, however) and to the defendant. Said Bolland, B.: "We are called upon to determine the right of three parties. The defendant wishes to employ Mr. Jay as his attorney; the practice and interests of Mr. Jay in that capacity are concerned; and the plaintiffs wish to prevent the defendant from availing himself of the services of this particular attorney in the present case. Before we can interfere and exercise the power we possess in restraining the rights of the defendant and Mr. Jay, we ought to be satisfied that there are sufficient facts to call for our interposition. It is said that the defendant has no right to employ Mr. Jay, and the only reason that can be collected from the affidavits in support of that assertion is, that he has been before employed and discharged by the opposite party. Now, the opinion of Lord Eldon in Cholmondeley v. Clinton, after consulting all the judges, the Master of Rolls, and the Vice-Chancellor, seems to have been, that a solicitor discharged by his client, not on the ground of misconduct, is in a different situation from a solicitor who has left the cause voluntarily, and that the former may be employed by the opposite party. Lord Eldon appears clearly to have considered, that if an attorney or solicitor be discharged by his client, he is at liberty to employ his talents and exertions for the opponent. If the attorney afterwards communicates the secrets of his former client, or if, in the service of his new client, he misconducts himself, by making an improper use, to the prejudice of his former client, of knowledge which he has acquired confidentially in the course of his former employment, the court may be applied to, to interfere by the exercise of their discretion." Here, too, it will be observed that the order contemplated was one not merely affecting the solicitor, but the defendant also; and so the order was framed in the next case on the subject, Waller v. Fowler,[27] decided by Sir W. M'Mahon, M.R., in 1836.—*Irish Law Times.*

[24] Brady v. Lawless, S. & Sc. 365.

[25] 9 Bing. 1; 2 M. & Sc. 2.

[26] Johnson v. Marryat, 2 Cr. & M. 183; 2 Dow. 343; 4 Tyr. 83.

[27] S. & Sc. 369.

EQUITY—VOLUNTARY RELEASE OF DEBT.

IRWIN v. JOHNSON.

New Jersey Court of Errors and Appeals.

Voluntary declarations by a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will not operate as an equitable release.

On appeal from a decree advised by Vice-Chancellor Bird.

Richard Corlies died January 2, 1879, leaving a will, of which Levi G. Irwin and Aaron E. Johnson were the executors.

At the time of the death of Mr. Corlies there were, in the possession of one Annie Jones (a grandchild who lived with him), two mortgages made to the deceased by the complainant, Elizabeth E. Johnson, who is her daughter. These mortgages were placed in the hands of the executors as a part of the assets of the estate, in the shape of subsisting debts against Mrs. Johnson. Subsequently Mrs. Johnson and her husband gave a promissory note to the executors, secured by a chattel mortgage, in payment of one of the said mortgages, which mortgage was then canceled of record. She files her bill in this suit, the prayer of which bill is that the subsisting mortgage may also be cancelled; that the cancellation of the other mortgage, for which the note was given, may be confirmed, but that the note and chattel mortgage given for it may be canceled, and the executors enjoined from suing upon any of these instruments. The fact which the complainant alleges to exist, and upon which she grounds her claim for relief, are, substantially, the following: That the testator informed the complainant that upon his decease the said mortgages should be hers; that he offered to deliver the mortgages to her, but that she being unable to pay the increased tax which would follow, refused to accept them; that the mortgages were delivered to Annie Jones for the purpose of delivering them, after his decease, to complainant.

John J. Ely, for appellant; *Chillion Robbins*, for respondent.

REED, J., delivered the opinion of the court:

The complainant's counsel placed his claim for relief upon two grounds: First, a gift of these mortgages to Mrs. Johnson; second, an equitable release of them to her by the deceased during his lifetime.

The contention upon the first ground is that the delivery to Annie Jones of these mortgages was a delivery to Mrs. Johnson with an intent to pass the property in the mortgages to the complainant. There is nothing in the case to support this contention. How these papers came into the hands of Annie Jones is only explained by her own testimony, and it is entirely inconsistent with the view that it was a transference of the dominion over the property from the testator to Mrs. Johnson. She says that they were given her, with instructions by the testator to give them, upon his decease, to the persons who were to settle his business. Outside of her testimony I find nothing which would (under the rules which guard the passage of property by gift) bring the present case into a semblance of a gift. Nor did the vice-chancellor place the case upon that ground. He put his conclusions entirely upon the doctrine of an equitable release. The rule adopted, and which he was bound to recognize as the law, is laid down in the case of Leddel v. Starr, 5 C. E. Gr. 274. Chancellor Zabriskie, in this case, announced the rule in these words: "There is a series of decisions in courts of equity in England and in this country which have established the principle that when a creditor has, by written or parol declarations, with regard to a debt, or by conduct tantamount thereto, declared or agreed that a debt shall be relinquished or given up, or that it has been so relinquished or given up, a court of equity will consider this an equitable release, and will not permit his representatives to enforce it." The rule so laid down was broad enough to cover a case where a person had announced his intention to discharge a debt.

If we assume that the facts in this case show that Mr. Corlies, in his lifetime, announced to Mrs. Johnson that upon his death these mortgages should be hers, and to others that he intended to make her equal with his grandchildren by giving her the mortgages, I yet think the rule which controlled the court below is one which, before adoption by this court, should be the subject of careful scrutiny.

At law it is apparent that a parol declaration of the kind set out in this case would have no efficiency at all. A debt can not be extinguished by a mere statement by the creditor that he does not intend to enforce it, or that he forgives it, or even by a receipt for the whole, when, in fact, a part only has been paid.

The recognition of a doctrine which permits a mortgage to be extinguished by a verbal declaration of the debtee that he did not intend to insist upon its payment, would seem to break down not only the rule already mentioned, but that which forbids the revocation of an instrument by an act less solemn than the act creating it. Here there is neither payment nor an agreement for a good consideration to discharge, nor a technical release under seal. There is in the doctrine an encroachment upon the field designed to be covered by the statute of wills, because it permits a person by parol to give a direction to his property after his decease variant from the course it would take by the direction of the instrument executed in conformity with the requirement of the statute. The doctrine has been accepted in a few cases, but seems to have arisen from a desire to alleviate the supposed hardship of special cases, and from a mistaken view of what was ruled in a case decided in the high court of Parliament as early as the year 1724. I allude to the case of Wekett v.

Raby, reported in 2 Bro. P. C. 16. This was that case: The testator made a will by which he made his daughter Mary his executor and residuary legatee. A man named Raby had been his counsel. The testator held Raby's bond for £255. In his last sickness the testator said to Mary, the legatee: "I have Raby's bond, which I keep. I don't deliver it up, for I may live to want it more than he, but when I die he shall have it. He shall not be asked for it."

After the death of the testator Raby demanded the bond of Mary. She refused to deliver it, but said you may be easy, for it is safe in my hands. He hinted that accidents or matrimony might put it out of her power to deliver it. She said if I marry I will deliver it the night before. Afterwards Raby having acted, as Mary thought, in an unfriendly manner towards her, she put the bond in suit. A bill was exhibited in the court of chancery, and the suit was restrained. There is no opinion in the case.

Before the high court of parliament, the counsel of the complainant put their case upon the doctrine that a trust was imposed on Mary, the executrix and residuary legatee, by the direction of the testator to her, and her acknowledgment thereof, and her express promise to deliver up the bond. There was no insistance that the parol declarations in themselves amounted to a discharge of the security. What the views of the court were is only inferential. Judge Story speaks of this as a case which would be clearly insupportable as a *donatio mortis causa*, and as carrying the doctrine of an implied trust, or equitable extinguishment of a debt to the very verge of the law. Story's Eq. Jur., sec. 706.

Mr. Pomeroy classifies the case as one supporting the doctrine that where declarations are made under such circumstances, that the testator imposed a constructive trust upon the property given by his will, so that the beneficiary would not be evuitably entitled to the gift without, at the same time, carrying out the trust and discharging the debt. The statement of Mr. Pomeroy is intended to include the cases in which the beneficiary by some act or word assents to the declared intention of the testator, so that thereafter it would be a fraud upon his part to refuse to carry out the testator's design, as by his assent he has induced the testator to rely upon it rather than change his will or incorporate his intention in a future will.

Of this class is the case of Williams v. Vreeland, decided in this court and reported in 5 Stew. Eq., 734. That was the view taken by Lord Hardwicke in the case of Byrn v. Godfrey, 4 Ves. 6. After mentioning the circumstances upon which Wekett v. Raby was decided, he says: "From all this, the court had a fair ground to conclude the case stood exactly according to the representation of the plaintiff, and, being so, the testator, talking to a residuary legatee, and that being admitted, so that the court has sufficient evidence, the residuary legatee will not be permitted to benefit herselt of that which was not given to her. It is very near an undertaking by her to do something if the will is not changed. Therefore, the silence is assent on the part of the residuary legatee. and an engagement which, in point of conscience, ought not be broken by her."

It is true that Lord Cottenham, in Flower v. Marten, 2 Myl. & Cr. 459, took a different view of what was decided in the case of Wekett v. Raby. He seems not to have considered the case critically, nor to have had in mind the case of Byrn v. Godfrey. He mentioned the case of Wekett v. Raby, after he had already decided the case which he then had under consideration upon another ground, namely, that no debt had ever equitably existed.

In the subsequent case of Cross v. Sprigg, 6 Hare, 552, Vice-Chancellor Wigram says the circumstances of that case (Wekett v. Raby) bring it within the principle examined by the vice-chancellor in Podmore v. Gunning, 7 Sim. 644. The case of Podmore v. Gunning, was this: A testator gave his real and personal property to his wife absolutely—

"Having perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease."

Two natural children of the testator, after the death of the wife, filed a bill against the wife's heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his property, after her death, to the plaintiffs, and that she promised and undertook to do so.

The court held that upon proof of these facts a trust arose in favor of the plaintiff. This is the doctrine of Williams v. Vreeland, in this court, already mentioned.

In the case of Sprigg v. Cross, the vice-chancellor criticises with great care and acuteness all the preceding cases in the equity courts, and denies that voluntary declarations indicating an intention on the part of a creditor to forgive or release a debt, if there be no evidence of a release at law, constitute a release in equity.

This case was reversed, but upon a point which did not shake the force of this conclusion. The same learned vice-chancellor, four years later, had occasion, in the case of Peace v. Hains, 11 Hare, 151, to reconsider the same question, and there refers with approval to his remarks in the case of Cross v. Sprigg.

In the case of Yeomans v. Williams, L. R. (1 Eq.) 184, the authority of the case of Cross v. Sprigg, was recognized by Sir J. Romilly, M. R., and the case under consideration was decided upon the ground that a father-in-law induced his son-in-law to live in a house by saying that he should pay no rent in the form of interest upon a mortgage held by the father-in-law upon the property, and that he could not collect interest, because he had induced the son-in-law to take a certain course of conduct by his statement.

In Taylor v. Manners, L. R. (1 Ch. App.) 48

the authority of the cases of Cross v. Sprigg and Peace v. Hains is assumed by the counsel, and Lord Justice Turner says at law certainly there was no perfect gift, and a court of equity as certainly will not enforce a mere intention to give. I find no more recent allusion to this doctrine in the English reports; but I think it is apparent that while the early decisions may be involved in some confusion, it can not be said that the doctrine of Leddel's Ex'rs v. Starr was the doctrine of the English court of chancery at the time when the law of that court became the law of this State. The case of Wekett v. Raby may not be satisfactory in any aspect in which it can be viewed; but that it did not establish the unqualified doctrine that a parol declaration of an intention to release operated as an equitable release, is, I think, clear. The doctrine of the courts of equity in England is now opposed to such a rule, and the utterances of those courts are in opposition to the claim that it was ever an established rule in those courts.

The case of Leddel's Ex'rs v. Starr was, in my opinion, a departure from the theretofore prescribed limits of equitable interference with existing obligations. It was a departure in the direction of insecurity and uncertainty which this court should not follow. The decree, below, founded upon this rule, should be reversed.

Decree unanimously reversed.

NOTE.—What indorsements on an obligation made by the obligee are sufficient to bar his representatives from enforcing it or not, in equity, Aston v. Pye, 5 Ves. 351, note; Major v. Major, 1 Drew. 165; Antrobus v. Smith, 12 Ves. 39; Trimmer v. Darby, 25 L. J. (Ch.) 424; Tiffany v. Clarke, 6 Grant's Ch. 374; Sherwood v. Smith, 23 Conn. 520; Otis v. Beckwith, 49 Ill. 121; Pennington v. Gittings, 2 Gill. & Johns. 208; Bulkeley v. Noble, 2 Pick. 337; Meriwether v. Morrison, 78 Ky. 572; Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400; Green v. Langdon, 28 Mich. 221; Ricketts v. Livingston, 2 Johns. Cas. 97; see Batton v. Allen, 1 Hal. Ch. 99.

What accounts, letters and memoranda of a decedent are sufficient to discharge an obligation or not, or to procure equitable relief therefrom, Eden v. Smyth, 5 Ves. 341; Morgan v. Malleson, L. R. (10 Eq.) 475; Scales v. Maude, 6 De G. M. & G. 43: Moore v. Darton, 7 Eng. L. & Eq. 134; Clark v. Warner, 6 Conn. 354; Hartwell v. Rice, 1 Gray, 587; Ellis v. Secor, 31 Mich. 185; High's Appeal, 21 Pa. St. 283; Loring v. Blake, 106 Mass. 592; Carpenter v. Soule, 88 N. Y. 251; Oller v. Bonebrake, 65 Pa. St. 338; Mallett v. Page, 8 Ind. 364; Jennings v. Blocker, 25 Ala. 415; Statlings v. Finch, Id. 518; Crawford v. McElvy, 2 Speer, 225.

An intentional destruction of the obligation amounts to a release of the debt, Gilbert v. Wetherell, 2 Sim. & Stu. 254; Silvers ads. Reynolds, 2 Harr. 275; Darland v. Taylor, 52 Iowa, 503; Gardner v. Gardner, 22 Wend. 526; Rees v. Rees, 11 Rich. Eq. 86. A mere expression of an intention to destroy it is not enough, Nelson v. Cartmel, 6 Dana, 7; Campbell's Estate, 7 Pa. St. 100; Chew v. Chew, 8 C. E. Gr. 471; see Harley v. Harley, 57 Md. 340.

A verbal gift of the arrears of an annuity can not be recalled after the death of the obligor. Long v. Long, 17 Grant's Ch. 251. See Johnson v. Johnson, 22 La. An. 144. And so of a surrender of an obligation, with an intention to cancel or forgive the debt. Hurst v. Beach, 5 Madd. 351; Vanderbeck v. Vanderbeck, 3 Stew. Eq. 265; Sherman v. Sherman, 3 Ind. 337; Edwards v. Campbell, 23 Barb. 423; Bridgers v. Hutchins, 11 Ired. 68; Lee v. Boak, 11 Gratt. 182; and what acts amount to such surrender. Ricketts v. Livingston, 2 Johns. Cas. 97; Dittoe v. Cluney, 22 Ohio St. 436; Melvin v. Bullard, 82 N. C. 33; Yonng v. Young. 80 N. Y. 422; Henderson v. Henderson, 21 Mo. 379; Shaw v. White, 28 Ala. 637.

The following declarations by deceased obligee, without any acts, were held insufficient to discharge the debt, or to prevent its enforcement in equity; that the obligor might do as he pleased with what he owed; that decedent should never ask him for it, or require him to pay it. Reeves v. Brymer, 6 Ves. 516. That the payee of a note told the maker (his son) that he never intended to collect it while he lived, and that after his death it should be the son's. Denman v. McMahin, 37 Ind. 241. That a donor had made a gift to his niece, etc. Wheatley v. Abbott, 32 Miss. 343; Kreider v. Boyer, 10 Watts, 54; Batton v. Allen, 1 Hal. Ch. 99. See Doty v. Willson, 47 N. Y. 580; Clark v. Clark, 17 B. Mon. 698. That the obligee [a father-in-law] took a bond from his son-in-law for money advanced, because he could not write or keep a book, but that the obligee need not pay it back. Haverstack v. Sarback, 1 Watts & Serg. 390. That a stepmother told the payee of her note that she never intended to collect the money on it, and that if it was not paid in her lifetime it was to be his. McGuire v. Adams, 8 Pa. St. 286. That a father said he would never collect anything from his son, whose note he held, and "live or die, he should never pay him one cent." Bradley v. Long, 2 Strobh. 160. That a father entered in his account-book the amount advanced to his daughter on her marriage, declaring that he did not do this for the purpose of making a charge, but for his own gratification; and he afterwards expunged the entry. Johnson v. Belden. 20 Conn. 322. That a father took the note of his daughter's husband for a farm sold to the latter by the father, promising his daughter and her husband that the whole amount should go as a gift to his daughter. Carpenter v. Dodge, 20 Vt. 595. That a father caused a writing to be drawn disposing of a mortgage debt in favor of his son's (the mortgagor's) family, and executed it, and said that he did not intend to enforce it, but meant that it should be canceled at his death. Chew v. Chew, 8 C. E. Gr. 471.

The following were held sufficient: "Take

back your writings [a bond and mortgage], I freely forgive you the debt," Richards v. Sims, Barn. Ch. 90; that a mother advanced money to her son, taking a mortgage therefor, and promised him that it should never be recorded or the money collected, Peabody v. Peabody, 59 Ind. 556; that a father requested his son to sign a note for the value of two horses given to him by his father, and represented to him that the note was never to be paid, Harris v. Harris, 69 Ind. 181; that an intestate had said he had given his son something handsome; that he had held a writing against him, not a note, but had made him a present of it, Wheeler v. Wheeler, 47 Vt. 637; that a nephew had given his uncle a deed of trust on slaves, to secure moneys loaned, but that the uncle said he never claimed or expected any benefit therefrom, and that he had permitted his nephew to sell all the slaves that were worth anything, Fitzhugh v. Fitzhugh, 11 Gratt. 210.—*John H. Stewart.*

JUDGMENT — ENTIRETY — VOID AS TO A PART OF THE DEFENDANTS.

HANLEY v. DONOGHUE.

Maryland Court of Appeals, October Term, 1882.

If a suit is brought in this State on a foreign judgment, which is admitted to be void as to some of the defendants, such a judgment must be held to be void as to all. The reason of the law is that the judgment is an entire thing and can not be separated into parts. If execution is issued on such a judgment it must be issued against all the defendants.

F. J. Brown, for plaintiff in error; *E. C. Eichelberger* and *J. I. Yellott*, for defendant in error.

ROBINSON, J., delivered the opinion of the court:

It appears from the pleadings in this case that suit was brought in Pennsylvania against Charles and John Donoghue on a joint contract; that Charles was regularly summoned, but no process of any kind was issued against John, nor did he appear in person or by attorney to the suit. Judgment, however, was subsequently recovered against both defendants, and on this judgment suit is brought in this State against Charles. In support of this action it is contended that the foreign judgment, although void as to John, is valid and binding on Charles, the party who was summoned.

At common law judgment was regarded as an entire thing, and being an entirety it has been repeatedly held that it could not be affirmed as to one or more defendants and renewed as to others. It must either be affirmed as a whole or reversed as a whole. Culling v. Williams, 1 Salk. 24; Parker v. Harris, 1 Ld. Rayd. 835; Lloyd v. Pearse, Coke Jac. 25; 2 Saunds. 101; 2 Bac. Abr. 228, marg.

Thus, in an action of trespass against two or more defendants, if one of them died pending the suit and judgment was rendered against all, it was decided that the entire judgment must be reversed; and for that reason, that being an entirety, it could not be affirmed in part and reversed in part. 2 Bac. Abr., Letter E, 228.

But conceding this to be the case where a judgment is affirmed or reversed on appeal, or on a writ of error, the argument is that the rule does not apply to a suit brought upon a foreign judgment recovered against two or more defendants, only one of whom are summoned, and which judgment has been permitted to stand unreversed and unchallenged. In such a case the appellant contends that the judgment is valid, and may be enforced against the party summoned in the original action, though void as to the parties against whom no process was issued. Now in determining this question we must not loose sight of this distinction between void and voidable judgments. A judgment rendered by a court having jurisdiction over the subject-matter, and the person is unquestionably conclusive and binding on the parties, unless reversed or set aside in some mode or manner prescribed by law. But is is essential to the validity of of a judgment in *personam*, that the court should have jurisdiction over the parties, and, if rendered without such jurisdiction, it is a mere nulity. Such a judgment is not merely erroneous because of some irregularity in the mode or proceeding or error on the part of the court in the application of the law to the particular case, and which the party aggrieved must seek a remedy by appeal or writ of error; but being a judgment rendered without jurisdiction it is absolutely void, and may be assailed at all times and in all proceedings by which it is sought to be enforced.

If, then, a judgment could not at common law be affirmed in part and reversed in part, because of its entirety, for the same reason if a suit is brought in this State on a foreign judgment, which is admitted to be void as to one of the defendants, such a judgment must be held to be void as to all. The reason of the law is that the judgment is an entire thing and can not be separated into parts. If execution is issued on such a judgment it must be issued against all the defendants.

The question now before us was fully considered in Hall v. Williams, 6 Pick. 232, where a suit was brought in Massachusetts on a judgment recovered in Georgia against two defendants, and it appeared from the record that one of the defendants had never been summoned, and had never appeared in person or by attorney to the suit brought against him in Georgia. And it was held (Parker, C. Jr., delivering the opinion of the court), that the judgment being entire, if it was a nullity with respect to one, it was a nullity also as to the other defendant. In the still later case of Wright v. Andrews, decided in 1881, 130 Mass. 150, the question was again argued before the

court, and the decision in 6 Pick. was approved, Gray, C. J., saying, that if the "court had no jurisdiction of one defendant, its judgment being entire and unqualified, is, in the absence of any evidence of the law of Maine upon the subject, void against both." These decisions have been followed by the courts of Maine, New Hampshire and other States. 45 Maine, 183; 11 N. H. 290; 1 Abbott U. S. C. R. 302. In Motteux v. St. Aubin, 2 W. Black. 1133; Ashlin v. Laregton, 4 Moore & S. 719; Gerard v. Basse, 1 Dall. 119; Silvus v. Reynolds, 2 Harr. (N. J.) 275.

Courts have permitted judgments on motion, some of them in the exercise of a quasi-equitable jurisdiction, to be set aside as to one defendant and to stand as to others. And in some States it has been decided that a judgment may be valid as to one defendant and void as to others. Douglass v. Massie, 16 Ohio, 271. The weight of authority is, we think, decidedly the other way, and in accord with the law as laid down in Hall v. Williams, 6 Pick. Looking at the question from an equitable stand-point purely, there is some force in the appellant's contention, that a judgment may and ought to be held valid as to parties summoned, and who had an apportunity to make their defenses, even though it may be void as to others against whom no process was issued. But if it be well settled, and such seems to be the law, that a judgment which is void as to one of the defendants is void also as to the other, the plaintiff, in taking such a judgment, has no one to blame but himself. In bringing suit against two parties on a joint contract, it was his duty to have directed process to be issued against both, and if he failed to do so, and subsequently took a judgment against one of the defendants who never had been summoned, he has no right to complain, because the law will not enforce the payment of such a judgmant. For these reasons the demurrer to the second and third counts were properly sustained.

The first count sets forth a judgment regularly recovered against both defendants; the suit is brought, however, against one only, and without any suggestion of the death of the other. Both were jointly and severally liable on the judgment, and both ought to have been sued, or some reason alleged why the other was not joined in the action. Merrick v. Bank Metropolis. 8 Gill, 14; Kent v. Holliday, 17 Md. 293; State v. Magraw, 12 G. & J. 265. This was decided in Prather v. Munroe, 11 G. & J. 261, where, upon a judgment against two defendants, *scire facias* was issued against the terre-tenants of one of the defendants only, without suggesting the death of the other, and upon demurrer this defect was held fatal.

Finding no error in the ruling below, the judgment will be affirmed.

FIRE INSURANCE — REMOVAL OF PROPERTY—CONSTRUCTION OF POLICY.

LYONS v. PROVIDENCE WASHINGTON INS. CO.

Supreme Court of Rhode Island, February, 1883.

Statements of the place in which the property is situated, contained in the policy are warranties which must be and continue true during the life of the policy. Consequently a removal, unassented to by the insurer will work a forfeiture.

CARPENTER, J., delivered the opinion of the court:

The plaintiff proved in the trial of this case in the court of common pleas, that she procured from the defendant a policy of insurance against fire on certain articles of furniture and wearing apparel described in the policy as "all contained in house No. 23 McMillen street, Providence, R. I.; that at the time of the fire the articles had been removed and were in a house on Power Street, where the fire occurred; that the defendant had never been informed of the removal; that she never told them of the removal and did not think it was necessary to tell them; and that at the time she procured the policy of insurance, she owned the house on McMillen Street in which the articles insured then were. In this state of the proof the defendant requested the presiding justice to instruct the jury that the permanent removal of the goods insured from the house on McMillen Street to the house on Power Street, without the knowledge and assent of the defendant corporation, terminated the contract of insurance and that the plaintiff could not recover. The presiding justice refused such instruction, whereupon a verdict was returned for the plaintiff, and the defendant brings this bill of exceptions.

On a former trial of this case the plaintiff was non-suit, and on exceptions the case was remanded for a new trial. On the first trial there was no proof that the house on McMillen Street was owned by the plaintiff, but on the second trial that fact was proved. The defendant argues that, inasmuch as this fact was presumably known to the defendant corporation at the time of the issue of the policy, there arises a presumption of intention by the parties to the contract sufficient to distinguish the case now presented from that formerly decided in this action. We do not find it necessary to pass on this question. This bill of exceptions, except for the fact above referred to, is in substance a motion for leave to re-argue the exceptions formerly sustained by the court, and we have accordingly considered the whole question anew, both on principle and authority.

There seems to be no doubt, that if this question were decided on authority, it must be taken as the general rule, that all the material statements of the policy of insurance, including statements as to the place in which the insured

property is situate, are warranties, and that such warranties must be true, and must continue to be true during the whole life of the policy as the condition of any recovery thereunder. Eddy Street Iron Foundry v. Hampden Ins. Co., 1 Cliff, 300; Shertzer v. Mutual Fire Ins. Co., 46 Md. 506; Wall v. East River Mutual Ins. C., 3 Seld. 370; Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166.

The plaintiff, however, contends that the case comes within an exception to the general rule. The argument is that inasmuch as the insured property is household and personal effects, and inasmuch as it is a matter of common knowledge that certain persons do at times change their place of abode, carrying with them such of their effects as are of the kind here insured, therefore it is to be presumed that the defendant issued the policy in suit with the knowledge and expectation that the plaintiff might make such a removal during the term of the insurance, and with the implied agreement that she might make such removal without vitiating the policy. There is, indeed, to be deduced from the cases an exception to the general rule as above stated; but we do not think that either in reason or on authority it goes to the extent claimed by the plaintiff. Briefly stated, the rule seems to be that the temporary removal of property, whether occasional or habitual, in pursuance of a use which is a "certain necessary consequence" arising from the character of the property, without any change in the ordinary place of keeping, will be no defense to an action on the policy. The reasoning of Lord Mansfield, although in a case of marine insurance, applies exactly to this question. Pelly v. Governor and Company of the Royal Exchange Assurance, 1 Burr. 341; Holbrook v. St. Paul Fire, etc. Ins. Co., 25 Minn. 229.

The plaintiff further contends that the general rule above laid down, is not founded in justice and sound reason, and ought not to be adopted in this case. The argument is that no person not learned in the purport of judicial decisions could know or infer that the words of the policy above quoted, which are in appearance merely descriptive, imported a warranty; and that therefore they should not now be so construed. We can not agree with this argument. We must assume that the words of a written instrument conveyed to the minds of the parties to that instrument the meaning and effect which have been imputed to those words by well-established judicial determinations. Undoubtedly such determinations, if they are to remain as authority, must appear to be based on the words themselves, or on something in the circumstances or relations of the parties, or of the contract. We think the interpretation of the words of this policy as a warranty is well drawn from the nature of the contract of insurance. It must be evident to any person who at all considers the nature of that contract, that the amount to be charged for premium must vary on consideration of the location of the property to be insured; and but small reflection would be necessary to perceive that the removal of the property to another place might be greatly to the disadvantage of the insurer, although such new place of deposit might not be in itself more exposed to damage from fire, since the result of such removals if permitted to a considerable extent, might be to expose an undue proportion of his capital to the risks of a single conflagration.

CORPORATION — DISSOLUTION — CONTRACT—INSURANCE AGENTS—COMPENSATION FOR SERVICES.

PEOPLE v. GLOBE MUTUAL LIFE INS CO.

New York Court of Appeals.

Where a life insurance company has contracted with a person to act as its general agent for a stipulated number of years, at a specified yearly salary, and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the State before the expiration of the term for which such agent has hired, such agent has no legal right to recover from the fund in the hands of the receiver the salary fixed by the agreement for the unexpired term of service, as damages for not continuing the employment, the contract having ended with the corporate dissolution by the action of the State, and there is no valid claim for damages for an alleged breach of the agreement by the company.

Edwin C. James, for appellant; *Geo. W. Wingate*, for receiver; *John C. Keelor*, Deputy Attorney General.

FINCH, J., delivered the opinion of the court:

There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears, it would have done so, if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. Shaw v. Republic Life Ins. Co., 69 N. Y. 292, 293; James v. Burchell, 82 N. Y. 113. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor.

There could be neither readiness nor ability to do the forbidden and unlawful acts. Jones v. Knowles, 30 Me. 402. So that from the necessity of the case as there were no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement.

One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation. Attorney-General v. Security Life Ins. Co., 78 N. Y. 115. Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract, in its own nature, was dependent upon the continued life of both parties. With the natural death of one or the corporate death of the other, the contract must inevitably end; so that in its own inherent nature, by the unexpressed conditions, subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of Mix differs from that of the policy-holders. We held in the Security case that the latter were creditors, and stood upon a breach of their contract; but that breach was not the dissolution of the company. It ante-dated such dissolution, and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken, and for that reason interfered, and when its decree of dissolution came, it had to deal with broken contracts, and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. Yelland's Case, L. R. 4 Eq. 350; Clarke's Case, L. R. 7 Eq. 350; Logan's Case, L. R. 9 Eq. 149; McClure's Case, L. R. 5 Ch. App. 737; Dean Gilbert's Case, Law Jour. 41 Eq. (N. S.) 476. In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding-up orders were made and the liquidators appointed.

When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases are obviously different. People v. National Trust Co., 82 N. Y. 283. They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides, and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned, directly, or indirectly, by the act or omission of the party pleading it as an excuse. In other words, such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, can not plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points, and need not be repeated. He has stated their purport correctly. In all of them, both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that, in the present case, the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions—was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it can not plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution.

The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much

as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution, since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the ship owner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved. Melville v. De Wolf, 4 E. & B. 844, similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible without his fault or that of the shipowner was held sufficient. Then, too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments honestly and prudently made would shrink beyond repair, and bring down a dissolution by the State. If in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense and through the same mode of reasoning, we might in a similar case of master and servant, trace the death of the former to his own negligence in eating, drinking or exposure to heat or cold, and so determine his non-performance to be inexcusable and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion or even the indirect cause of his own death, and in the same sense blameable for it, without its being, in a legal sense and considered as a *vis major*, his own act; so a corporation may be said, through the conduct of its officers, to have in some sort occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act—not at all the product of its own volition—and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act or neglect on the part of the other officers as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract when made, and belonged to it as an inevitable condition; for its complete performance depended upon the corporate life, and that under the law upon the fulfillment of the law's conditions. In the event of such corporate death, the motive of the State or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion, or however it may have been provoked or induced it must be deemed the act of the State and not of the corporate body. And it is the independent act of the State; for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow or may not follow. The Superintendent of Insurance may make the certificate which sets the law in motion or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does, it is his act and not the company's—dependent wholly on his volition and not on that of the corporation—an independent agency guided by its own motives, and not the act of the company producing its own death. If it be asked where this doctrine leaves the policyholders, and their claims for breach of contract, the answer is two-fold. Where the dissolution follows an impaired reserve, their contracts, as we have already said, were broken by the company before the State interposed. But their rights go much deeper than that. For while in the security case we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. If the State had dissolved this company while its contracts with the policyholders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policyholders on a different ground. The assets to be distributed would be the reserve, or so much of it as remained. That reserve, as we showed in the Security case, is made up of the excess of premiums paid by the policyholders in the earlier years of their policies beyond the real cost of insurance, to enable them to be carried in later years when the risk should be greater. Practically, therefore, at the date of dissolution, the reserve represent the earnings of the policies and the contributions of the policyholders. And as in the case of contracts for personal services dissolved without fault by death or the act of the law, the contract is apportioned and the servant entitled to his several earnings to the date of dissolution, so the policy holders would be entitled to the just earnings of their policies to the same date, and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equita-

ble ownership, which gives them a right beyond that of mere creditors seeking damages for a breach of contract. To make and carry out contracts of insurance is the very object of the corporation and the sole purpose of and excuse for its existence. The State gives it life for that end, and takes it away when the result is not reached. It watches it during life to see that it fulfils the purpose for which it was created, and buries it when that purpose fails. And as the creation of the company, and in its supervision and control, the rights of the policy holders and their safety are the paramount consideration, so they remain paramount when corporate death is inflicted.

The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a court of equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policy holders in equity; and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and, therefore, no shadow of an equity against the assets, the policy holders resisting his claim are protected by an equity not to be overlooked or disregarded.

Other considerations of very serious import were adverted to by the courts below which we need not here discuss. What has been said sufficiently indicates our opinion. No error was committed in rejecting the claim of the general agent. The order should be affirmed.

All concur.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY — REPRESENTING ADVERSE INTERESTS —EXCEPTIONS TO THE RULE.

Held, that the adverse interest of the parties and the conflicting and inconsistent duty of the agent, lie at the bottom of the general principles, that the same person can not be employed by the seller and purchaser of the same land, by the first to sell and by the other to purchase, where their interest in the services of such person are in any respect adverse, or where his will, discretion or judgment is to be or may be used adversely to both, and recover for his services from either. *Held*, that the exception to this rule, equally well established, is founded upon the absence of this adverse interest of the parties, and upon the concurrence of the duty of the agent towards both parties alike, as where the price is fixed by the seller, and merely accepted by the purchaser through the procurement of the agent, or where no terms are fixed and the agent acts as mere middle-men to bring the parties together. *Held*, that the case made by the plaintiff clearly falls within the exception. That the price was fixed by defendant and plaintiff procured the purchaser to accept these terms, that it is not shown that he had anything further than this to do with the negotiation. *Held*, that a non-suit was properly refused. *Barry v. Schmidt*, S. C. Wis., Feb. 20, 1883; 5 Wis. Leg. N. 203.

2. APPEAL—FINAL ORDER IN CONDEMNATION PROCEEDINGS.

In condemnation proceedings, under the statute, the power of the court, so far as fixing the rights of the parties is concerned, is exhausted when the report of the commissioners have been filed and approved by the court, in overruling a motion to vacate and set aside the same. Such final order has then been made as to authorize appeal or writ of error. *Denver, etc. R. Co. v. Jackson*, S. C. Cal., Dec. Term, 1882; 3 Col. Rep. 260.

3. ATTORNEY AND CLIENT — RETAINER TO ONE MEMBER OF FIRM OF LAWYERS.

Ordinarily, when one member of a firm of attorneys is employed, the firm is employed, and the employer is entitled to the services of all the members of the firm. The understanding between the partners in this case that, as respects the particular cases in which the services in question were rendered, each partner was to act as an individual and charge and receive compensation therefor as an individual, can not affect defendant, in the absence of his knowledge of, and assent to, such arrangement. As the case is presented, when the defendant employed the plaintiff, he employed the firm of which plaintiff was a member, and when defendant paid one member of that firm for services rendered by the firm, he paid both members of it for those services. *Williams v. Moore*, S. C. Cal., Jan. 16, 1882; 10 Pac. C. L. J. 705.

4. CRIMINAL LAW— FORGERY OF U. S. BONDS— QUESTION OF FACT.

1. An indictment for forgery, charging that the counterfeits were in the form of bonds of the United States, gave the circuit court jurisdiction; and whether they were in the form of those actually issued by the secretary of the treasury is a question of fact for the circuit court, which is not reviewable here by *habeas corpus* or otherwise. 2. On a writ of *habeas corpus* this court can consider only the question of jurisdiction, and not questions of evidence or rulings merely erroneous. *Ex parte Carll*, U. S. S. C., January 15, 1883; 5 Morr. Trans. 627.

5. EQUITY JURISDICTION — PROCEEDINGS BY ASSIGNEE OF CHOSE IN ACTION.

1. The mere fact that the assignee of a chose in action can not sue at law in his own name, to enforce for his own use the legal right to his assignor, does not authorize him to proceed by bill in equity. To give equity jurisdiction he must prove either that the assignor obstructed him in suing, or some other special ground of equitable interference. 2. Hence, a bill in equity by the assignee of a patentee for damages for infringement and for an account, no other special ground of equitable jurisdiction being alleged, was properly dismissed for want of jurisdiction. *Hayward v. Anderson*, U. S. S. C., Jan. 15. 1883; 5 Morr. Trans. 620.

6. EQUITY PRACTICE—BILL OF REVIEW—DEMURRER.

1. The only questions open for examination on a bill of review for error of law appearing on the face of the record are such as arise on the pleadings, pro-

ceedings and decree, without reference to the evidence. 2. As a demurrer only admits matters properly pleaded, and as the evidence is not properly re-examinable on such a bill, a demurrer to such a bill does not admit the truth of such evidence, 3. Where a bill has been taken for confessed against a party who, after service of process, has failed to appear, the omission to recite such fact in the decree is not sufficient to authorize a bill of review. 4. Affidavits filed on a motion to set aside a sale, when afterwards filed as exhibits with a bill of review, may be referred to in order to rebut the allegation of newly-discovered matter, although in no other respect a part of the record. *Shelton v. Kleeck*, U. S. S. C., Jan. 8, 1883; 5 Morr. Trans., 619.

7. HOMESTEAD EXEMPTION—PROPERTY USED AS A HOTEL.

The contention that mortgages executed under the power of attorney in question were invalid because the premises were the homestead of defendants, *held* not well founded. True, the husband filed a declaration of homestead on the premises prior to the execution of a power of attorney, but the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it, the homestead of the declarant. The use of the property is an important element to be considered. It appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. It was so used by them at the time of the filing of the declaration, and until August, 1874, when, because of the embarrassed condition of their business, they left the hotel and put it in other hands. The Wrights, it is true, lived in the hotel until August, 1874, but their residence there was but incidental to the business of "running the hotel." When they became embarrassed in their business they sought a residence elsewhere, and put the hotel property in charge of others; and this was prior to the execution of the power of attorney to the plaintiff. It would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be, the place where the home is. *Laughlin v. Wright*, S. C. Cal., Feb. 1, 1883; 10 Pac. C. L. J., 695.

8. INJUNCTION BOND — LIABILITY ON — COUNSEL FEES AS DAMAGES.

Reasonable and necessary counsel fees expended in obtaining a dissolution of an injunction are properly allowable as damages in a suit upon the undertaking given to secure damages to defendant by reason of issuing the writ. But an allowance for services of counsel in obtaining a final judgment, in the case that plaintiffs were not entitled to the injunction, is erroneous. *Porter v. Hopkins*, S. C. Cal., Jan. 16, 1883; 10 Pac. C. L. J., 689.

9. JUDGMENT— POWER OF COURT OVER, AFTER TERM.

1. Suit was brought in Colorado on a judgment rendered by the Superior Court of Cook County, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the Appellate Court of that State, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated: *Held*, that such proceeding is allowable. 2. While it is the general rule that, as to all matters that were in issue, or which might have been contested at the time judgment was rendered, the court has no power to vacate judgment after the expiration of the term at which it was rendered; yet as to matters arising after the judgment, or before the judgment, but too late to be presented as a defense, the rule is different. Relief in such case may be had by motion to vacate or otherwise, as the circumstances may require. 3. In this case the judgment of the Superior Court having been reversed and the case remanded for re-trial there, proceedings in this court will be stayed until final action by the courts of Illinois, when proper steps can be taken to afford relief, either by a reviewal of this motion, or by proceeding in equity, or otherwise, as the circumstances may require. *Heckling v. Allen*, U. S. C. C., D. Col., Dec. T., 1882; 3 Col. Rep., 242.

10. NEGLIGENCE—SIDEWALK ACCIDENTS—MUNICIPAL DISCRETION.

Where, in an action against a municipal corporation to recover damages for injuries caused by a fall upon a sidewalk, the allegation was that the sidewalk in question, though strongly constructed and in good repair, was built upon a defective and dangerous plan: *Held*, that the corporation can not be held responsible, and defendant's motion for a non-suit should have been granted, because negligence can not be predicated upon the plan or slope on which the walk was built, that being a *quasi* judicial or discretionary act of the municipality, and not a ministerial act, such as the duty of keeping streets in repair, for neglect to perform which an action by the party injured will lie. *Urquhart v. City of Ogdensburg*, N. Y. Ct. App., Jan. 16, 1883; 23 Daily Reg., 409.

11. PARTNERSHIP— ACCOUNTING BETWEEN PARTNERS—LACHES OF FIRM CREDITOR.

In 1877 A supplied goods to B's order for use on board ships of which B was ship's husband and managing owner. C was partner with B in the ownership of the ships. In December, 1877, C settled accounts with B, allowing his disbursement for the goods supplied by A, but without requiring B to produce vouchers for the payments to A, which, in fact, had not been made. In December, 1879, C again settled accounts with B, upon the footing of the last accounts. In 1880 B died insolvent, and in 1881 A's legal personal representative for the first time applied to C for payment for the goods supplied in 1877. *Held*, that the delay in applying to C for payment was not sufficient to raise an equity against his common law liability to pay for goods supplied to the partnership. *Davidson v. Donaldson*, Eng. Ct. App., 31 W. R., 277.

12. REVENUE—CUSTOMS DUTIES ON ALE, PORTER, ETC.

Schedule D of section 2504 of the Revised Statutes imposes the following customs duties: "Ale, porter and beer in bottles: thirty-five cents per gallon; otherwise than in bottles: twenty cents per gallon." Schedule B of the same section imposes the following customs duties: "Glass bottles or jars filled with articles not otherwise provided for: thirty per centum *ad valorem*." "All manufactures of glass * * * * not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for: forty per centum *ad valorem*." Under these provisions, the bottles in which ale and beer are imported are subject to a duty of thirty per cent. *ad valorem*, in addition to the duty of thirty-five cents per gallon on the ale and beer im-

ported in the bottles. *Schmidt v. Badger*, U. S. S. C., Jan. 15, 1883; 5 Morr. Trans., 621.

13. STATUTE OF FRAUDS — ORAL SALE OF REAL PROPERTY—POSSESSION.
The oral sale of a house, which is treated as personal property, to be paid for in work and materials on demand when the purchaser goes into actual possession of the house, is not within the statute of frauds; and when such facts are set up in an answer as a defense and as a counter-claim, evidence of such sale is admissible. *Snider v. Thrall*, S. C. Wis., Jan. 30, 1883; 15 Ch. Leg. N., 196.

14. STATUTE OF FRAUDS—SALE OF LAND—POSSESSION WITH PERMANENT IMPROVEMENTS.
Possession to which is added permanent improvements of great value, is such a part performance as will take parol contracts for the sale of land out of the Statute of Frauds. *Eberly v. Lehman*, S. C. Pa., Oct. 4, 1882; 13 Pittsb. Leg. J., 273.

15. STATUTE OF LIMITATIONS—EVIDENCE OF ADVERSE POSSESSION—OFFER TO PURCHASE.
The plea of defendant was the Statute of Limitations, and he relied upon adverse possession of the property for five years immediately preceding the commencement of the action as constituting a bar to the plaintiff's action. There was evidence tending to show an offer on the part of defendant to purchase the property from plaintiff within the period of five years next preceding the commencement of the action. *Held*, such an offer, if made, was a clear recognition of plaintiff's title, and a perfect answer to defendant's claim of adverse possession. *Central Pac. R. Co. v. Mead*, S. C. Cal., Feb. 1, 1883; 10 Pac. C. L. J., 698.

16. ULTRA VIRES—BUILDING ASSOCIATION.
A building association which has, without authority in its charter, received deposits from strangers, can not, in case of insolvency, decline to repay such deposits on the ground of its want of authority to receive them. Such depositors are to be regarded as creditors of the association. *Appeal of Criswell*, S. C. Pa., Oct. 2, 1882; 12 W. N. C., 489.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

23. Ch. 196 Rev. Stat. Wis., provides that the judges of the courts of record, court commissioners and all justices of the peace, "shall have power to cause all laws made for the preservation of the public peace, to be kept," etc. It also provides that every person who shall "in the presence of any magistrate mentioned in this chapter, or before any court of record," "contend with hot and angry words, to the disturbance of the peace, may be ordered without process or any further proof," to recognize for keeping the peace, and in default thereof to be committed. It further provides that if "any magistrate or officer mentioned in this chapter, shall have any knowledge that any assault and battery is about to be committed, or that any affray is about to occur, he shall forthwith issue a warrant and proceed as directed when complaint has been made; and if such offense is committed, threatened or attempted in his presence, he shall immediately arrest the offender or cause it to be done; and for this purpose no warrant or process shall be necessary, but the officer may summon to his assistance any sheriff, coroner or constable, and all other persons present," etc. Does this statute leave the same power in sheriffs, constables, coroners and other officers not named therein, to arrest persons committing a breach of the peace or felony during its commision or immediately afterward, or to prevent the commission, as they had at common law, or does it impliedly cut off that right and restrict it to the persons expressly named? E. A. R.
Hartford, Wis.

QUERIES ANSWERED.

[Query 15. [16 Cent. L. J. 138.] Is a public highway, to-wit.: A county road, over lands, an incumbrance within the meaning of the covenants of warranty, and against incumbrances. Please cite authorities. LEX.

Answer No. 1. It is not. If it existed when the deed was executed, the purchaser is presumed to have taken with full notice. If it did not, it is an exercise of the right of eminent domain, which is not within the covenants. Such acts of sovereignty are not within the province of the warranty. Smith v. Hughes, 50 Wis. 620; Kutz v. McCune, 22 Wis. 628; Rawle on Covenants, and cases cited.
Oshkosh, Wis. G. W. B.

Answer No. 2. The following cases hold that it is: Parish v. Whitney, 3 Gray, 516; Hubbard v. Norton, 10 Conn. 422; Herrick v. Moore, 19 Me. 313; Pritchard v. Atkinson, 3 N. H. 335; Kellogg v. Ingersoll, 2 Mass. 101; Haynes v. Young, 36 Me. 561; Lamb v. Danforth, 59 Me. 324; Burk v. Hill, 48 Ind. 52; S. C., 17 Am. Rep. 731; Purcell v. R. Co., 50 Mo. 504; Beach v. Miller, 51 Ill. 206. The contrary doctrine is held in Kutz v. McCune, 22 Wis. 628; Scribner v. Holmes, 16 Ind. 142; Desvergess v. Willis, 56 Ga. 515; Patterson v. Arthurs, 9 Watts, 152, Dobbins v. Brown, 12 Pa. St. 80; Wilson v. Cochran, 46 Id. 299; Whitbeck v. Cook, 14 Johns. 483, and Smith v. Hughes, 50 Wis. 620, also strongly tend this way. See 3 Washb. Real Prop. (4th ed.), and 2 Waits Actions & Defenses, 379, where most of the above authorities are collected; also Rawle on Covenants, 141 *et seq*. E. A. R.
Hartford, Wis.

LEGAL EXTRACTS.

MR BENJAMIN'S RETIREMENT.

The retirement of Mr. Benjamin from practice at the bar puts an end, or what looks like an end, to one of the most remarkable careers—to the most remarkable career perhaps of its kind—recorded in our day. Born an English subject, Mr. Benjamin became an American by domicile very early in life. He was called to the American Bar in the year of the first Reform bill, and for fully thirty years he was one of the most prominent lawyers and politicians of the United States. When the United States for the time ceased to be united, Mr. Benjamin deserved the title of brain

of the Confederacy, as Lee deserved that of its right arm. The failure of his party closed, at any rate for the time, all avenues of political and even of professional life to him in the country which he had made his own. At the half-way house between fifty and sixty, and after the failure of such an adventure, few men would have even hoped for more than the opportunity to live quietly either abroad or at home, and wait for the end. Mr. Benjamin, however, was not of the stamp of man who acknowledges defeat. Like a citizen of the *exsecrata civitas* of old, he made himself a new fortune and a new reputation across the sea. English and American law have perhaps retained more resemblance to each other than English and American literature, certainly more than English and American society or politics, and Mr. Benjamin began the world again in her Majesty's courts. In the fifteen years or so which have since passed he has, in the fierce competition of the English Bar obtained for himself a name absolutely second to none in respect of knowledge of certain departments of law, and still more of argumentative power. Rhetoric he did not affect, nor did he probably possess or aim at possessing that re-remarkable knack of influencing a jury which, without rhetoric strictly so called, many great advocates have enjoyed or acquired. Intellectual grasp, and practical ingenuity in applying that grasp, the logic of a schoolman and the tact of a modern man of science, make the differentia of the kind of legal reputation which Mr. Benjamin enjoyed, and let us hope will long continue to enjoy, though he has been compelled to give himself rest from increasing it. The very last to start of all his contemporaries at the English bar, there were very few, indeed, in his own division of the race whom he did not outrun. A career of such a kind is, we say, almost unexampled. Occasionally a politician, driven by war or revolution from his own country, has risen to high position in another. But this has rarely occurred at such an age as Mr. Benjamin had reached when Grant overcame the resistance of the South, and it has almost invariably been due to personal favor in high places. Mr. Benjamin, no doubt, had friends in England who may have smoothed away some technical difficulties and hastened some honorary distinctions. But the reputation he has obtained is not of the kind that friends can hasten or enemies can mar. The source of that kind of reputation lies, in Carlylian phrase, "under a man's own hat." There are not many hats now covering heads which have covered a will so indomitable and an intellect so powerful—as the will necessary to determine its possessor on the beginning of a new career at fifty-five, and the intellect necessary to achieve such a performance in it. Mr. Benjamin's race and nation have generally shown themselves perfectly alive to the truth of the principle that "it's dogged as does it," and they are not as a rule devoid of wits. But the late Secretary of the Southern Confederation and the present, or all but present, leader of his own department of the English bar, must be allowed the possession of a portion as disproportionate as his famous namesakes of both doggedness and wits. Many men might have achieved either of Mr. Benjamin's two successful careers. Few men would have been able to found the second on the ruins of the first.—*London Daily News.*

LEGAL MUSE.

At the recent dinner given to Chief Justice Sharswood, Wm. Henry Rawle, of the Philadelphia Bar, expressed the hope "that the day is not distant when our Rules of Property may be 'wedded to immortal verse,'" and read the following:

THE RULE IN SHELLEY'S CASE.

When by a will or deed, in tail or fee,
The ancestor an estate of freehold takes,
And mediately or immediately,
The will or deed a limitation makes
To heirs, in fee or tail, the word heirs shall be—
No matter how all common sense it shakes,
Or how absurd it seems upon the surface—
A word of limitation, not of purchase.

This is the Rule, and it will bear the test
Of criticism or judicial clamor.
Some words of Coke's and some of Smith's are pressed
Beneath the strokes of the poetic hammer,
Keeping of Smith's verbosity the best,
And mending Coke's atrocities of grammar;
It will be found that it contains compressed in
Its lines the cream of Coke and Smith and Preston.

The style is Byron's but is much more stupid—
The last refers to matter more than style—
But unlike him, I have no sprightly Cupid,
Whose lively amours can my thoughts beguile
From dusty tomes, to which my mind must stoop at
From morn to midnight, without rest the while;
But students now will read the law with pleasure.
With this hard rule set in Byronic measure.

NOTES.

——The Emperor of Austro-Hungary has decorated the Hon. Charles Gibson of this city, his counsel in the case against Baron Von Bechtolsheim, late Austro-Hungarian Counsel at St. Louis, who embezzled funds of his office, as Knight Commander of the Order of Franz Josef. The order is as high as any in the empire or in Europe. This is said to be the highest honor ever conferred by a great European sovereign on an American lawyer. The knights of the order wear their cross on the lapel of the coat, but the Commander's insignia is pendant to a silken collar around the neck, making it a very striking personal ornament.